Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197
	)	

COMMENTS OF COX ENTERPRISES, INC.

COX ENTERPRISES, INC.

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SUMMARY

Cox has owned daily newspapers and broadcast stations in Dayton, Ohio since 1934 and in Atlanta, Georgia since 1948. In both markets the co-ownership of Cox newspapers and broadcast outlets has benefited the community by increasing, not decreasing, the diversity of local viewpoints and by extending, not preventing, economic competition. Data shows that advertising prices are no higher in Atlanta or Dayton than they are in other comparable markets, and viewers, listeners, readers and the communities in general have benefited greatly from the financial resources Cox has invested in the local Atlanta and Dayton communities. Co-ownership of daily newspapers, television and radio stations serves the public interest and, therefore, Cox urges the Commission to eliminate the daily newspaper-broadcast cross-ownership rule.

No one disputes that the media marketplace has changed dramatically since the daily newspaper-broadcast cross-ownership rule was adopted in 1975, and those changes have only accelerated since the Commission last examined the rule in 1998. More outlets for dissemination of information are now available, and the explosion of media outlets has forced broadcasters and newspaper owners to become even more competitive in their efforts to reach readers, viewers and listeners and to attract advertisers.

Given the changes in the media marketplace, the Commission must acknowledge that the analytical perch for the daily newspaper-broadcast cross-ownership rule, "spectrum scarcity," has vanished. Indeed, recognizing the dynamic change and growth in the media marketplace, Congress has found that the doctrine of "spectrum scarcity" is no longer valid. In the doctrine's absence, the high standards of the First Amendment and the Constitutional guarantee of equal

protection will be difficult to surmount, and application of these Constitutional standards will ultimately require elimination of the rule.

Indeed, these Constitutional infirmities impose a heavy burden on the Commission: for a broadcast ownership rule to pass judicial muster, the Commission must show both that a specific harm actually exists and that the rule will actually fix or prevent the harm. Cox asserts that, at the close of this proceeding, the record before the Commission will show neither. Instead, as Cox's experience shows, co-ownership of newspapers and broadcast stations does not decrease diversity or competition, but instead increases diversity and preserves competition. The Commission must not fail to act: at the conclusion of this proceeding the Commission must swiftly eliminate the daily newspaper-broadcast cross-ownership rule.

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> *I also must respectfully dissent from the majority's conclusion that the newspaper/broadcast cross-ownership rule continues to serve the public interest. . . This rule raises significant First Amendment concerns, and, as a result, requires rigorous analysis in support of its continuing validity. To my mind, the Order falls short of that bar, and I cannot conclude that the rule continues to serve the public interest as a result of competition. . . .I would support a proceeding that would look critically at how the significant and far reaching changes in the video marketplace since 1975 have eviscerated the need for what is an extremely prohibitive regulation.*[1]

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its comments in response to the *Notice* in the above-captioned rulemaking proceeding.[2] Cox is pleased that the Commission has initiated a long-overdue review of the daily newspaper-broadcast cross-ownership prohibition.[3] Rather than focusing on the subsidiary issues raised in the *Notice*,

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[1] 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd 11058, 11154, 11157 (2000) ("*Biennial Review Report*") (Separate Statement of Commissioner Michael Powell).

[2] Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy, *Order and Notice of Proposed Rulemaking*, MM Docket Nos. 01-235, 96-197, FCC No. 01-262 (rel. Sep. 20, 2001) ("*Notice*").

[3] Cox holds grandfathered daily newspaper-broadcast combinations in two markets, Dayton, Ohio and Atlanta, Georgia. In 1997 the Commission approved Cox's acquisition of a radio

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however, the Commission should undertake the "rigorous analysis" suggested by Chairman Powell in his statement in last year's proceeding on this matter, and acknowledge (1) that the daily newspaper-broadcast cross-ownership prohibition rests on precarious Constitutional grounds and (2) that the record produced from the *1998 Notice of Inquiry* contains no factual foundation to support the rule's retention.[4]

The D.C. Circuit recently stated that if a Commission ownership restriction is to survive judicial review, "the FCC must show a record that validates the regulations" and must "demonstrate that the recited harms are real, not merely conjectural."[5] Further, Congress has stated that the Commission must affirmatively determine that an ownership rule remains necessary and must repeal regulations that are no longer in the public interest.[6] These judicial and legislative standards place the burden of proof not on the parties who would eliminate an ownership regulation, but rather on the Commission to develop a record that can support retaining it. Accordingly, if the Commission seriously believes that its rules should "reflect the

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station in LaGrange, Georgia, outside of Atlanta, which is conditioned on the outcome of this rulemaking proceeding. *See* NewCity Communications, Inc. (Transferor) and Cox Radio, Inc. (Transferee), *Memorandum Opinion and Order*, 12 FCC Rcd 3929 (1997).

[4] *See, e.g.,* 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, 13 FCC Rcd 11276 (1998) ("*1998 Notice of Inquiry*"). Despite the lack of a record that could uphold the daily newspaper-broadcast cross-ownership rule, the Commission nevertheless retained the rule last year. *See Biennial Review Report* at ¶ 88. The Newspaper Association of America challenged the Commission's decision not to repeal the rule. *See Newspaper Ass'n of America v. FCC*, Case No. 00-1375 (D.C. Cir. filed Aug. 16, 2000). Because the Commission had pledged to initiate this proceeding and review the rule further, the D.C. Circuit is holding this case in abeyance.

[5] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("*Time Warner II*") (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

[6] Telecommunications Act of 1996, Pub. L. 104-104, § 202(H) Title II, 110 Stat. 56, 111.

situation as it is, not was,"[7] it must either develop a record in this proceeding that sustains *its* burden of proof or it must eliminate the daily newspaper-broadcast cross-ownership rule.

I. CONSTITUTIONAL REQUIREMENTS MANDATE THAT THE DAILY NEWSPAPER-BROADCAST CROSS-OWNERSHIP PROHIBITION BE ABOLISHED.

"Spectrum scarcity" was the analytical foundation for the Supreme Court's upholding of the daily newspaper-broadcast cross-ownership prohibition in 1978.[8] Stating that "[t]he physical limitations of the broadcast spectrum are well known," the Court found that the Commission could allocate broadcast licenses "so as to promote the 'public interest' in diversification of the mass communications media" without implicating the First Amendment or equal protection requirements.[9] Today, however, the continued viability of the concept of "spectrum scarcity" has been virtually and fully eroded by Congress, the marketplace and the courts. The Commission must, therefore, either address how the concept of "spectrum scarcity" is still

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[7] *Notice* at ¶ 1 (citing Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, S*econd Report & Order*, 50 FCC 2d 1046, 1075 (1975), *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*")).

[8] *NCCB*, 436 U.S. at 801-02.

[9] *Id.* at 799. "Enhanced diversity of viewpoints" was the professed purpose behind the adoption of the daily newspaper-broadcast cross ownership prohibition. *Id.* at 786. The original record showed no pattern of specific abuses by existing cross-owners and the studies submitted by the parties concerning the effects of newspaper ownership on competition and station performance were inconclusive. Nonetheless, the Commission found, and the Court concurred, that "[i]ncreases in diversification of ownership would possibly result in enhanced diversity of viewpoints, and, given the absence of persuasive countervailing considerations, 'even a small gain in diversity' was 'worth pursuing.'" *Id.* (citing *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1076, 1080 n.30 (1975)). This theory of diversity was found constitutional because of the physical limitations of broadcast spectrum.

viable, or admit that the constitutionality of the daily newspaper-broadcast cross-ownership prohibition is in doubt.

A. Absent "Spectrum Scarcity," First Amendment Principles Demand the Repeal of the Daily Newspaper-Broadcast Cross-Ownership Prohibition.

"Spectrum scarcity" was first used by the Supreme Court to justify broadcast regulation in 1943.[10] Twenty-six years later in the seminal 1969 *Red Lion* case, the Court found that "scarcity is not entirely a thing of the past," and therefore upheld the Commission's political editorial and personal attack rules despite First Amendment concerns.[11] Following *Red Lion*, the Supreme Court upheld the daily newspaper-broadcast cross-ownership prohibition in 1978,[12] but just six years later began to question the doctrine of spectrum scarcity, noting that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years."[13] The Court was unwilling, however, to reconsider the spectrum scarcity doctrine "without some signal from Congress or the FCC."[14]

As Chairman Powell stated in 1998, now is the time to "be getting those signal fires ready."[15] Cox and others convincingly demonstrated in 1998 that the concept of "spectrum scarcity" is a thing of the past, and developments over the intervening three years have only

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[10] *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943).

[11] *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 396 (1969) ("*Red Lion*").

[12] *NCCB*, 436 U.S. at 801-02.

[13] *FCC v. League of Women Voters of California,* 468 U.S. 364, 367 (1984).

[14] *Id.*

[15] Commissioner Michael K. Powell, Willful Denial and First Amendment Jurisprudence, Remarks Before the Media Institute (Apr. 22, 1998), *at* http://www.fcc.gov/Speeches/Powell/spmkp808.html.

strengthened their arguments.[16] Significantly, Cox notes that the rules at issue in *Red Lion* were vacated by the D.C. Circuit last year when the Commission was unable, despite repeated requests from the court, to provide "reasoning that would demonstrate to the court that [the rules] are in the public interest notwithstanding some interference with and some burdens on speech."[17] Earlier in the same proceeding the court noted that while *Red Lion* is still binding precedent it "has been 'the subject of intense criticism,'"[18] and expressed skepticism that broadcast spectrum scarcity continues to provide a rationale for imposing public interest obligations on broadcasters.[19]

In addition, as the *Notice* points out, the proliferation of media outlets has continued. There are more television and radio stations, cable television networks, broadcast networks, and weekly newspapers now in existence than there were in 1998.[20] Daily newspaper readership and circulation numbers have, however, declined, as has the audience share of the traditional broadcast networks.[21] Thus, the quantitative data in the *Notice* itself proves that would-be speakers have more opportunities than ever before to make their views heard, while the homogeneity of newspaper and broadcaster viewpoints has decreased.

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[16] For administrative convenience, Cox will not restate the arguments it made in the Commission's proceeding on the 1998 Biennial Review. Cox has, however, attached its comments and reply comments in that proceeding to these comments at Exhibits A and B, and asks that they be included and considered part of the record in response to the *Notice.*

[17] *Radio-Television News Directors Assoc. v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000).

[18] *Radio-Television News Directors Assoc. v. FCC*, 184 F.3d 872, 877 n.3 (citing *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997)).

[19] *Id.* at 883.

[20] *Compare Notice* at ¶¶ 9-11 with *Biennial Review Report* at ¶¶ 9-13.

[21] *Notice* at ¶¶ 1, 10.

For example, the Internet is a powerful new media outlet and means of expression for millions of people, even more so than is acknowledged in the *Notice*. While the *Notice* points out that as of November 2000, 56 percent of Americans had access to the Internet from home,[22] the *Notice* does not reflect that in the workplace, Internet users have reached nearly 38 million, up 21 percent from only one year ago.[23] In total, at least 62 percent of *all* Americans now have access to the Internet,[24] up significantly from 1999 when only 39 percent of all Americans had access to the web.[25] In fact, more people used the Internet in October, 2001, than ever before.[26] Growth should continue, as three out of four American homes will have access to broadband Internet service by the end of this year,[27] making the Internet an even more attractive means of accessing local news and video information.

The most recent Pew Research Center biennial survey of the national news audience documents the rapid emergence of the Internet as a news source.[28] Fully one-in-three Americans now go online for news at least once a week, compared to 20 percent in 1998, and 15 percent say

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[22] *Id.* at ¶ 12.

[23] Michael J. Miller, *Forward Thinking; e-business revolution; Industry Trend or Event*, PC MAGAZINE, July 1, 2001, at 7.

[24] Dick Kelsey, *U.S. Internet User Count Hits All Time High - Survey*, NEWSBYTES, *at* http://www.newsbytes.com/news/01/172123.html (Nov. 13, 2001).

[25] *U.S. Internet Audience Up 16 Percent in Past Year*, CYBERATLAS, *at* http://cyberatlas.internet.com/big_picture/geographics/print/0,,5911_864541,00.html (Aug. 13, 2001).

[26] Dick Kelsey, *U.S. Internet User Count Hits All Time High - Survey*, NEWSBYTES, *at* http://www.newsbytes.com/news/01/172123.html (Nov. 13, 2001).

[27] Dick Kelsey, *75% of U.S. Will Have Access To Broadband At Home By Year-End*, NEWSBYTES, *at* http://www.newsbytes.com/news/01/171771.html (Nov. 2, 2001).

[28] *Notice* at ¶ 15 n. 53 (citing Pew Research Center, *Investors Now Go Online for Quotes, Advice: Internet Sapping Broadcast News Audience*, *at* http://www.people-press.org/media00rpt.htm (last visited Nov. 13, 2001) ("*Pew Center Study*").

they receive daily reports from the Internet, up from 6 percent two years earlier.[29] Over the same two-year period, regular viewership of network news fell from 38 percent to 30 percent, while local news viewership fell from 64 percent to 56 percent.[30] Among younger and better-educated people, the Internet is making even bigger inroads. More college graduates under the age of 50 use the Internet every day than regularly watch one of the nightly network news broadcasts.[31] A similar NTIA study shows that 43.2 percent of on-line Americans use the Internet to check the news, up from 40.7 percent just two years before.[32]

Given the current abundance of media outlets, including the Internet, the doctrine of "spectrum scarcity," which was on thin ice several decades ago, can now be sustained only if it can walk on water. The First Amendment rights of broadcasters and daily newspaper owners must now prevail over such a non-existent scarcity foundation. If the daily newspaper-broadcast cross-ownership prohibition is to stay in place, therefore, the Commission must at a minimum affirmatively prove that spectrum scarcity is still somehow a controlling component of today's splintered media marketplace. If, however, the Commission cannot show that spectrum scarcity still mandates regulation, the Commission will be unable to meet First Amendment standards and therefore must repeal the daily newspaper-broadcast cross-ownership rule.

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[29] *Pew Center Study.*

[30] *Id.*

[31] *Id.*

[32] National Telecommunications and Information Administration, *Falling Through the Net: Toward Digital Inclusion*, *available at* http://www.ntia.doc.gov/ntiahome/fttn00/chartII-15.htm (Oct. 2000).

B. Congress Has Also Made a Finding that "Spectrum Scarcity" No Longer Exists.

Section 202(h) requires the Commission to examine its broadcast ownership rules on a biennial basis and eliminate those rules that no longer are in the public interest.[33] In adopting Section 202 as part of the Telecommunications Act of 1996, Congress briefly discussed the history of broadcast regulation. Congress recognized that broadcast ownership rules "were promulgated to ensure that the American consumer received audio and video programming from a variety of sources utilizing a scarce resource, the radio frequency spectrum."[34] Congress found, however, that there have been significant changes in the video marketplace over the past fifty years such that "the scarcity rationale for government regulation no longer applies."[35] Accordingly, by adopting Section 202(h), Congress intended for the Commission to "depart from the traditional notions of broadcast regulation and to rely more on competitive market forces. In a competitive environment, arbitrary limitations on broadcast ownership and blanket prohibitions on mergers or joint ventures between distribution outlets are no longer necessary."[36]

Section 202(h) shows that Congress has given the Commission limited authority to retain broadcast ownership restrictions. The Commission is not permitted to simply recite "spectrum scarcity" and instead must consider economic competition. In the absence of competitive or other legitimate public interest concerns which, as the record will show, do not exist, Section 202(h) requires the repeal of the daily newspaper-broadcast cross-ownership prohibition.

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[33] Telecommunications Act of 1996, Pub. L. 104-104, § 202(H) Title II, 110 Stat. 56, 111.

[34] Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat. 56, 111) 18 (legislative history of the broadcast ownership provisions of the Telecommunications Act of 1996).

[35] *Id.*

[36] *Id.* at 19.

C. Equal Protection Requirements Are Also Violated by the Daily Newspaper – Broadcast Cross-Ownership Prohibition.

Under the due process clause of the Constitution, and even where there are no fundamental rights at stake, equal protection requires that government provide at least a rational basis for the differing economic treatment of substantially similar groups.[37] Because there is no rational basis on which broadcasters or newspaper owners can be singled out from among the many players in the media industry and denied the opportunity to commonly own in-market newspapers or broadcast stations, the daily newspaper-broadcast cross-ownership prohibition cannot stand.

As Cox and others explained in 1998, broadcasters are no longer the sole or even the dominant provider of video programming, yet broadcasters alone are singled out by the Commission's rules as ineligible to own an in-market daily newspaper.[38] Further, daily newspapers and broadcast radio and television stations are interchangeable with other outlets such as the Internet, local and national cable channels, weekly newspapers and direct mail as avenues from which consumers get their news and information, and the courts have found that these media outlets compete against one another in the advertising market.[39] In our mobile

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[37] *See*, *e.g.*, *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

[38] *See* Joint Comments of Cox Broadcasting, Inc. and Media General, Inc. at 25-27, *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35 (filed July 21, 1998) (attached as Exhibit A); Joint Reply Comments of Cox Broadcasting, Inc. and Media General, Inc. at 3-7, *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35 (filed Aug. 21, 1998) (attached as Exhibit B).

[39] *See, e.g., Midwest Radio Co., Inc. v. Forum Publishing Co., WDAY, Inc.*, Civ. No. A3-85-9, 1989 WL 108352, at *3-*4 (D.N.D. 1989), *affirmed*, 942 F.2d 1294 (8th Cir. 1991) (defining the relevant product market in an antitrust case as including daily newspapers, commercial radio, commercial television, weekly newspapers shoppers, billboards, magazines and direct mail);

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society, most Americans are exposed to news, ideas and advertising from multiple sources throughout the day.

In 1978 the Supreme Court upheld the daily newspaper-broadcast cross-ownership prohibition against equal protection claims because it found that the rule "treat[s] newspaper owners in essentially the same fashion as other owners of the major media of mass communications [*i.e.* television and radio station owners] . . . under the Commission's multiple-ownership rules."[40] Today, in a media market of television duopolies and the multiple ownership of local radio stations, the Supreme Court could not make the same statement because newspaper owners are, in fact, treated differently from other media owners. As there is no rational basis for this differing treatment, the Commission must recognize that equal protection requirements demand repeal of the daily newspaper-broadcast cross-ownership rule.

II. THE RULE DECREASES DIVERSITY AND HAS NO IMPACT ON COMPETITION.

As discussed above, with the elimination of the "spectrum scarcity" crutch, the Commission will face a much higher standard in its attempt to show that the public interest goals of diversity and competition are sufficient to uphold the daily newspaper-broadcast cross-ownership rule against constitutional attack. Apparently understanding the higher burden the

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Cable Holdings of Georgia, Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987) (defining the market as including cable television, satellite television, video cassette recordings, and broadcast television); *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346, 1364 (N.D. Cal. 1974), *affirmed in part, rev'd in part on other grounds*, 548 F.2d 795 (9th Cir. 1977) (defining the market as including newspapers, radio, television, magazines, circulars and direct mail); *Sales and Advertising Promotion, Inc. v. Donrey, Inc.*, 598 F. Supp. 538, 547 (N.D. Okla. 1984) (defining the market as including newspapers, television, radio, direct mail, magazines, billboards, and other advertising specialties and a submarket to include local radio, local newspapers, local billboards, zoned direct mail advertising).

[40] *NCCB*, 436 U.S. at 801.

Commission faces, most of the *Notice* asks questions aimed at gathering data on diversity and competition in the local media marketplace. While Cox agrees that the Commission should gather the data that "will enable the Commission to analyze the issues based on a solid and complete factual foundation and make decisions accordingly,"[41] Cox believes that the data collected in this proceeding will not support the retention of the daily newspaper-broadcast cross-ownership rule even under the more lax competition and diversity analysis that the Commission traditionally has applied in this area. As Cox will show, the daily newspaper-broadcast cross-ownership rule is not necessary, or even useful, in promoting the Commission's dual goals of diversity and competition. Further, under *Time Warner II*, even if the rule reasonably could be used to promote diversity (rather than, as Cox will show, decrease it), and increase competition (which the court in *Time Warner II* questions), the Commission "must still justify the limits that it has chosen as not burdening substantially more speech than necessary."[42] Because diversity and competition are not advanced by the daily newspaper-broadcast cross-ownership prohibition, the Commission must eliminate the rule.

A. "Diversity" Is Increased, Not Decreased, by Co-Ownership.

As the *Notice* states, "[t]he Commission has sought to ensure that the public has access to a diversity of viewpoints to promote First Amendment values."[43] There is, however, no evidence to show that common ownership of daily newspapers and broadcast stations produces homogenous viewpoints and, indeed, Cox's experience has been just the opposite. Rather than decreasing diversity, Cox's grandfathered daily newspaper-broadcast combinations have

[41] *Notice* at ¶ 1.

[42] *Time Warner II*, 240 F.3d at 1130.

[43] *Notice* at ¶ 14.

provided local viewers, listeners and readers with diverse viewpoints and more local news coverage than otherwise would have been available.

Cox has long owned grandfathered newspaper and broadcast combinations in two markets, Dayton, Ohio and Atlanta, Georgia. In both markets the newspapers and broadcast stations compete vigorously in their newsgathering and reporting, while at the same time they periodically join forces to provide enhanced coverage of local issues and events. In both markets, competing media owners have not matched the depth of the community outreach and programming that WHIO-TV, WSB-TV, and the Atlanta and Dayton Cox radio stations have displayed.

Cox entered the Dayton market in 1898 when former schoolteacher and reporter James M. Cox purchased the Dayton Evening (now Daily) News. Mr. Cox established the first Dayton area radio station, WHIO, in 1934, followed by WHIO-TV in 1949. While the newspaper, radio and television stations have always been separately operated, they periodically join forces to enhance their contribution to the Dayton community. For example, among the many instances where they have combined their resources for the enhancement of the Dayton area, WHIO-TV, WHIO(AM) and the Dayton Daily News in the past year have

- sponsored a live debate between the mayoral candidates. WHIO-TV broadcast the debate which featured questioning by reporters from WHIO and the Dayton Daily News. The debate, the only televised debate of the campaign, was rebroadcast by a local public television station. The debate provided Dayton voters with a unique opportunity to hear the candidates' positions on a variety of issues.

- produced a "Winter Weather Survival Guide" that features content provided by WHIO-TV meteorologists and Dayton Daily News reporters. This annual feature provides users with winter survival tips that are important and potentially life-saving in the snowbelt region.

- promoted a high school football "Game of the Week." The game between two different local high school teams is promoted by the Dayton Daily News, WHIO-TV,

WHIO(AM) and "activedayton.com" each week, thus providing local high schools with much appreciated media coverage.

Cox has also been active in Atlanta for many years. Cox purchased the Atlanta Journal in 1939, and in 1948, Cox launched the south's first television station, WSB-TV, the same year that Cox launched the south's first FM radio station, WSB-FM. Two years later, in 1950, Cox purchased the Atlanta Constitution. In Atlanta, WSB-TV and the now combined Atlanta Journal-Constitution have enhanced their records of public service by providing the Atlanta area with a series of investigative reports that have prompted change. For example, in November of 1999 the newspaper and television station revealed cases of convicted felons teaching in Georgia classrooms.[44] A number of school systems responded to the story by requiring stricter background checks on potential teachers. In January 2001, a joint investigation compared social security death records with a database of registered voters, revealing many examples of dead people casting votes.[45] After the story broke, the state of Georgia passed legislation to address the problem. In February of this year, a joint story on convicted felons driving school buses also prompted new requirements for background checks.[46] Most recently, the newspaper has allowed WSB-TV access to its overseas reporters in Afghanistan, thereby providing Atlanta area viewers with a greater understanding of the current war on terrorism.

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[44] Leon Stafford, *Teacher on leave after slaying conviction surfaces*, THE ATLANTA JOURNAL AND CONSTITUTION, Nov. 12, 1999, at 3E.

[45] Kathey Pruitt, *Cox sets sights on dead voter*, THE ATLANTA JOURNAL AND CONSTITUTION, Jan. 20, 2001, at 4H.

[46] Mary Lou Pickel, *Traffic violations, suspensions, criminal pasts – and they're driving school buses in Georgia*, THE ATLANTA JOURNAL AND CONSTITUTION, Feb. 26, 2001, at 1D, Mary Lou Pickel, *Bus drivers may learn fate soon*, THE ATLANTA JOURNAL AND CONSTITUTION, Feb. 28, 2001, at 6B.

The strength of the Cox organizations in Dayton and Atlanta has also increased diversity within the different Cox media outlets. For example, in Atlanta, Cox recently discontinued publishing its afternoon newspaper, The Atlanta Journal, because of declining circulation over the last decade, especially in the past two years. Rather than discontinuing the local news coverage and editorial sections of The Atlanta Journal, however, these sections were retained and combined with those of Cox's morning newspaper, The Atlanta Constitution. Today, the combined Atlanta Journal-Constitution has more local news and more editorial space than either paper had alone. Both editors of the respective paper's editorial pages were retained and the two editors will continue to write columns, often (as they have in the past) with opposing views.[47] As the publisher of the combined paper has stated, "[t]he Atlanta Journal-Constitution will have one of the most dynamic editorial sections in America. A key element will be a commitment to making space available for opposing views on a same or next-day basis. Our goal is to get you to think, not tell you what to think."[48] By combining its two newspapers, Cox has ensured that the majority of newspaper readers in Atlanta have access to *more* differing viewpoints and *more* local news coverage than they have had in the past.[49]

Cox's experience in Atlanta is, in fact, consistent with the Commission's findings regarding the benefits common ownership can offer to diversity. For example, in its recent

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[47] For example, the papers routinely endorsed opposing political candidates such as the Constitution's endorsement of Vice President Gore and the Journal's endorsement of Governor Bush. They also routinely took different positions on issues such as local transportation initiatives, the economy and taxes.

[48] Roger Kintzel, *Atlanta Journal, Atlanta Constitution to combine seven mornings a week*, HEADLINER, Issue 61 (Oct. 17, 2001).

[49] Circulation data confirms that the majority of newspaper readers in Atlanta read a single newspaper and, therefore, now have more access to local news and viewpoints in the combined newspaper than they had previously by reading either newspaper alone.

Report and Order amending the "dual network" rule, the Commission found that allowing common ownership of national networks would increase, not decrease, diversity.[50] Rather than finding that common ownership would produce common programming and viewpoints, the Commission found that if two networks are owned by a single entity, the networks "would have a strong economic incentive to diversify their program offerings, particularly by increasing service to minority or 'niche' tastes and interests."[51] Common ownership was also not found to adversely affect the provision of news and public affairs programming. Specifically, the Commission found that dual network ownership would not affect the independence of an existing news organization or cause a reduction of diversity in news or public affairs programming.[52] To the contrary, common ownership was found beneficial in that it would allow the weaker network to re-deploy the resources of the larger network to provide viewers of the weaker network with otherwise unavailable news and public affairs programming.[53]

In today's busy society, newspapers and broadcasters compete for the same limited block of time that potential viewers, readers and listeners have to devote to news and information gathering and entertainment. As the Commission found when it re-evaluated the dual network rule, each media outlet has an economic incentive to reach the broadest audience while at the same time differentiating itself from its competition. Common ownership should, therefore, provide an increased, not decreased, incentive for media outlets to provide diverse views as the

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[50] *See* Amendment of Section 73.658(g) of the Commission's Rules – the Dual Network Rule, *Report and Order*, 16 FCC Rcd 11114 (2001) ("*Report and Order*") at ¶ 31. In the *Report and Order* the Commission amended the dual network rule to allow any of the top four national television broadcast networks – ABC, CBS, Fox and NBC – to own, operate, maintain or control emerging broadcast networks such as UPN and WB.

[51] *Report and Order* at ¶ 37.

[52] *Report and Order* at ¶ 38.

combination strives to reach the largest total audience as, indeed, has been Cox's experience in its co-owned markets. The elimination of the daily newspaper-broadcast cross-ownership rule will, therefore, have no adverse effect on diversity and may, in fact, lead to increased diversity. Therefore, the goal of diversity is served by eliminating the daily newspaper-broadcast cross-ownership rule.

B. Co-Ownership Does Not Distort the Marketplace or Inhibit Competition.

Today, competition for an advertiser's dollar is fiercer than it has ever been. With the fragmentation of the media marketplace, as documented above, broadcasters and newspaper publishers are winning a smaller percentage of media dollars in the marketplace. Advertisers are also using "new" media outlets such as cable and the Internet. Regardless of whether they are in a co-owned market, all broadcasters and newspaper publishers have the incentive to seek out their maximum share of advertising expenditures. However, as shown below, co-ownership does not allow broadcasters and newspaper publishers to charge advertisers higher prices because of the efficient distribution of information in the advertising market and because there are so many outlets among which advertisers can choose. Given, therefore, that advertising competition will not be decreased by allowing the co-ownership of newspapers and broadcast stations, the Commission's interest in "competition" cannot provide the support for the daily newspaper-broadcast cross-ownership rule.

As an initial matter, Cox notes that antitrust analysis and consumer protection laws are better tools to protect competition in a specific advertising market than is an overbroad Commission rule. The series of questions asked in the *Notice* about the relevant product and

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…continued

[53] *Id.*

geographic markets are duplicative of those the Department of Justice or the Federal Trade Commission would ask pre-merger in evaluating a daily newspaper-broadcast combination, and there is no advancement of public policy for the Commission to repeat that review.[54] Further, while vigorous advertising competition *may* lower advertising costs, and lower advertising costs *may* result in lower prices to consumers, the price a consumer pays for a bar of soap is not a legitimate concern for the FCC.[55] The Commission should leave issues such as how the advertising market affects the prices of consumer goods to agencies such as the Federal Trade Commission and the Department of Justice that have the experience, and the mandate, to deal with such issues. To reach these issues through examining broadcast ownership rules creates an inefficient governmental redundancy that does not serve the public interest.

Cox also notes that while television, radio and newspapers compete for advertising revenue, the Commission must consider the differences between each medium when considering whether co-ownership will impact competition. For example, while both newspapers and broadcast television are powerful tools for reaching consumers, advertisers often use them both, and for very different reasons: television is used to build and maintain image or brand (*e.g.*, the grocery store ad showing a clean, well-lit store) while newspapers are used to move product (*e.g.*, the grocery store ad with dozens of products/prices). In addition, while some advertisers use a media mix, others are exclusive or nearly exclusive newspaper, radio or television advertisers. Television advertisers can be further segmented by those who purchase local spot

[54] *See, e.g., Notice* at ¶¶ 20-24.

[55] Should the Commission choose to rely on the "lower consumer prices" theory of competition as support for the retention of the daily newspaper-broadcast ownership rule, it will need empirical economic data, rather than theoretical supposition, for the theory to survive judicial review.

advertisements and those who make national buys.[56] Indeed, while many large newspaper advertisers are also substantial users of television, most of these television buys are national, not local, spot purchases. Finally, in some markets, for newspapers, pre-printed advertising inserts can account for up to 50 percent of newspaper advertising revenue and for pre-printed advertising users, the primary competitive option is direct mail. Thus, when examining competition between newspapers and broadcasters, many factors must be considered.

In general, however, competition assures that daily newspaper-broadcast combinations cannot increase advertising rates. Advertisers, both on the national and on the local level, have data from multiple sources that they can access to create their advertising budgets and media plans. For example, the Media Market Guide, published by an independent media research company, SQAD Inc., provides advertisers with competitive advertising cost information for broadcast stations and newspapers in markets throughout the country. Specifically, information in the Guide includes:

Television Cost Data:

- DMA SQAD TV Costs per Rating Point ("CPP") – Household Trends
- Markets Ranked by Costs per Thousand ("CPM") Households
- Average DMA TV Home Rating Trends for the Top Three Stations by Daypart in 100 Top Markets
- 21 Individually Reported Demographics with DMA CPPs and DMA & TSA CPMs by Demographic for Ranked Markets
- Children (2-11) Weekday and Saturday Morning CPPs for 50 Top Markets
- CPPs by Daypart for All Markets Alphabetically

Cable Cost Data:

- 30 Second Spot Costs by Network

[56] Cox estimates that local spot advertising sales account for less than 50 percent of station revenue in many markets.

Radio Cost Data:

- Cumulative SPARC Radio CPP in Ranked Markets for 26 Demographics by 5 Dayparts
- Radio Daypart CPP in Alphabetical Market Order for 26 Demographics for 5 Dayparts

Newspaper Cost Data:

- Daily and Weekend Newspapers by Top DMA Markets (Circulation, DMA/Metro/Home County Coverages, Inch Rates, and Reps)

Magazine Cost Data:

- National Magazine Circulation and Page Costs for Top 50 Ranked DMA Markets
- Circulation, Costs, and Subscriber Profiles for City and Regional Magazines in Top 100 DMA Markets

Given that advertising costs per rating point for television and radio and advertising costs by circulation are publicly available, co-owned newspapers and broadcast stations have no ability to leverage their market positions to increase prices because advertisers will simply move their dollars elsewhere.[57]

In fact, a review of the SQAD figures shows that aggregate advertising prices in grandfathered markets are consistent with prices in other markets after adjusting for market size. For example, a report prepared by The Marketing Communications Group, Inc. using SQAD data shows that television advertising prices in Cox's Atlanta and Dayton markets are consistent with their market size: Atlanta is the tenth largest market on a household basis and has the tenth highest advertising cost per point and Dayton is the fifty-fifth largest market on a household

[57] In fact, a district court in Atlanta rejected a claim that the Atlanta Journal-Constitution has market power in advertising, pointing out that "[n]ewspapers compete with other mass media for advertising business, such as . . . direct mail services, cable television, commercial television broadcast stations, and commercial radio stations." *Valet Apt. Services v. Atlanta Journal & Constitution,* 865 F. Supp. 828, 833 (N. D. Ga. 1994), *aff'd mem.*, 50 F.3d 1039 (11th Cir. 1995).

basis and has the fifty-fifth highest advertising cost per point.[58] This can be contrasted with other markets such as San Diego (twenty-fifth largest market and fourteenth highest cost per point) where advertising prices are higher than would be expected, given market size.

For newspapers, the data tells the same story: newspapers that are part of grandfathered broadcast combinations do not charge advertisers higher rates. A comparison of comparable markets by Newspapers First shows that advertisers can reach readers with a quarter-page advertisement in the Sunday newspaper for 27 cents per copy distributed in Philadelphia (Philadelphia Inquirer/Philadelphia Daily News); 24 cents per copy distributed in Washington, D.C. (Washington Post); 26 cents per copy distributed in Atlanta (Atlanta Journal-Constitution); and 28 cents per copy distributed in Houston (Houston Chronicle).[59] This study shows that advertisers in Atlanta do not pay more to reach their targeted audiences than do advertisers in non-grandfathered markets.

Data from several different sources shows that grandfathered daily newspaper-broadcast cross-ownership combinations do not distort the marketplace by increasing advertising prices. Co-ownership of newspapers and broadcast stations cannot be shown to decrease competition, and prohibiting co-ownership of newspapers and broadcast stations cannot be shown to increase competition. Therefore, because competition is not advanced by prohibiting co-ownership, the Commission must eliminate the daily newspaper-broadcast cross-ownership rule.

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[58] The Marketing Communications Group, Inc., *2001 Television Cost-Per Point Comparison: 1st Quarter* (2001) (unpublished cost-per-point comparison chart).

[59] Newspapers First, *Five Market Comparisons* (2001) (unpublished chart comparing circulation and publishing costs in several markets).

C. *Time Warner II* Sets a Standard the Daily Newspaper-Broadcast Cross-Ownership Prohibition Cannot Meet.

Time Warner II presents the Commission with three hurdles that must be cleared for the daily newspaper-broadcast cross-ownership rule to survive judicial review. First, the Commission must show that the rule increases diversity and competition and that it is not constitutionally infirm, given that the rule implicates the First Amendment and equal protection. Second, the Commission must show that the rule conforms to Congressional findings. Finally, the Commission must provide a solid evidentiary record that shows that the harm the rule is intended to fix or prevent actually exists, as well as a record that shows that the rule *will* actually fix or prevent the harm. Because the Commission will be unable to clear any of these hurdles, it must eliminate the daily newspaper-broadcast cross-ownership rule.

In the *Notice* the Commission seeks comment on how *Time Warner II* impacts the Commission's diversity and competition analysis.[60] *Time Warner II* is relatively straightforward in this regard. While the case reviewed horizontal and vertical cable ownership limitations, it is instructive here because the same two goals, diversity and competition, were relied upon by the Commission to uphold the cable rules in question.

On diversity, the Court of Appeals clearly would be deeply concerned about a Commission rule that has the effect of substantially decreasing diversity. On competition, the court stated that the Commission "seemed to ignore the true relevance of competition," and chastised the Commission for equating market share with market power.[61] Rather than looking at market share, the court said that the Commission should have examined the elasticities of

[60] *Notice* at ¶¶ 32-33.

[61] *Time Warner II,* 240 F.3d at 1134.

supply and demand, which in turn are determined by the availability of competition.[62] The same analysis would apply here and would preclude, for example, a Commission attempt to retain the daily newspaper-broadcast cross-ownership rule based on a finding that co-owned newspapers and broadcast stations would have a large share of the advertising market. Instead, the Commission must make some finding of market power in co-owned markets that is different from market power in non-co-owned markets for competition to be a basis for retaining the rule.

Finally, *Time Warner II* confirms the evidentiary record necessary to uphold the daily newspaper-broadcast cross-ownership rule. As the Supreme Court has stated, the Commission must do more than "simply 'posit the existence of the disease sought to be cured.'"[63] The Commission must "draw 'reasonable inferences based on substantial evidence,'"[64] and while the courts do give deference to the predictive judgments that necessarily involve the expertise and experience of the agency, those predictive judgments cannot be made in a vacuum.[65] Without a valid record, at the end of this proceeding, the Commission will have no choice but to abolish the daily newspaper-broadcast cross-ownership rule.

III. CONCLUSION.

In the 1970s the Commission adopted the daily newspaper-broadcast cross-ownership rule despite First Amendment and equal protection concerns in the hopes that it would increase local diversity. Citing "spectrum scarcity," the Supreme Court allowed the rule to stand even

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[62] *Id., citing AT&T Corp. v. FCC,* 236 F.3d 729, 736 (D.C. Cir. 2001).

[63] *Id.* at 1133 (citing *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, 512 U.S. 622 (1994) (quoting *Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434, 1455 (D.C. Cir. 1985))).

[64] *Id.* (citing *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, 512 U.S. 622, 666 (1994)).

[65] *Id.*

though the Commission lacked an evidentiary record to show that an actual harm existed, not to mention that the Commission lacked an evidentiary record to show that the daily newspaper-broadcast cross-ownership rule would quell the theoretical harm. Today, the courts and Congress have made plain that the Commission cannot cavalierly adopt or keep broadcast ownership restrictions unless they are solidly based in a record that shows an actual harm with an actual solution. Here, where there is no showing of harm, the Commission cannot fail to act: at the conclusion of this proceeding the Commission must swiftly eliminate the daily newspaper-broadcast cross-ownership rule.

Respectfully submitted,

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